IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1149 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

AYAR BHACHHU RAMAIYA

Appearance:

MR BD DESAI, APP for the appellant.
MR CH VORA for original complainant.
MR JIVANLAL G SHAH for the Respondents.

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE D.P.BUCH

Date of decision: 28/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

This is an appeal under section 378 of the Criminal Procedure Code, 1973, (for short "the Code") challenging the judgment and acquittal order dated 31st May, 1985 recorded by the learned Additional Sessions Judge, Kachchh at Bhuj in Sessions Case No. 44/84, in which the present respondents were charged for having committed offences punishable under sections 302, 147, 148, 149 read with section 114 I.P.Code and in the alternative, for the offence punishable under section 302 read with section 34 of the Indian Penal Code.

2. The prosecution case before the Trial Court was that on 30th January, 1984 at about 5.45 P.M. the present respondents had gathered together and they formed an unlawful assembly, the common object of which was to cause the death of Ayar Radha Vala. That they all were armed with deadly weapons, like spear, axe and sticks with iron rings. The prosecution has also alleged that the respondents above-named had assaulted deceased Ayar Radha Vala at the aforesaid place at village Mokhana in Bhuj Taluka of Kachchh district. That the 1st respondent was armed with a spear, respondent no.4 was armed with an axe and the remaining respondents were armed with sticks with iron rings. That they all committed assault on the deceased and dealt blows with the respective weapons held by them. That on account of the injuries sustained by the deceased on the aforesaid date, time and place, the deceased fell down on the ground and even thereafter also the respondents continued to cause injuries to him. That as a result, the deceased died on the spot.

3. The prosecution has also alleged that original informant Bhura Rata and his companion both were grazing their cattle in the nearby area. That they saw the respondents assulting the deceased. That therefore, they went to the spot and by the time they could reach there, the respondents had run away. It is also the case of the prosecution that informant Bhura Rata inquired from the deceased as to how he was beaten. At that point of time, the deceased could utter a word 'Bachu' (referring the name of respondent no.1). That the deceased could not utter any further word and he succumbed to the injuries on the spot at that place itself. Thereafter the informant went to the village keeping his companion Teja Jiva on the spot to lookafter the dead body of the deceased. The informant went to the village and informed the son of the deceased Lakhman Radha and his brother. At that point of time, it is the case of the prosecution, the informant had given detailed history as to how the

incident took place, to the said son of the deceased. Thereafter the informant as well as son of the deceased Lakhman Radha both went to the spot where dead body of the deceased was lying. The said witness was kept there and the informant went to the Police Station for lodging First Information Report.

4. The First Information Report was lodged by him, which was registered before the Police Station. Thereafter the investigating police officer had investigated the case, inquest was made, dead body of the deceased was sent to the Medical Officer for performing postmortem, the offence was registered before Bhuj Taluka Police Station at Bhuj Taluka Police Station C.R.No. 19/84. The investigating officer had arrested the respondents and had seized the weapons produced by them under different panchnamas, including discovery panchnama. The investigating officer also recorded statements of various witnesses. The clothes put on by the respondents were seized. They were stained with blood and, therefore, their weapons as well as their clothes were referred to Chemical Analyser for chemical analysis and for Serologist report. Even the clothes put on by the deceased were also attached and they were referred for chemical analysis and also serology. After completion of the investigation and after receiving reports from various departments, investigating police officer submitted the chargesheet before the learned Chief Judicial Magistrate, Kachchh at Bhuj, where the case was registered as Criminal Case No. 1229/84.

5. Since the offence punishable under section 302 of I.P.C. for which chargesheet was submitted, was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate committed the case against the respondents to the Court of Sessions, Kachchh at Bhuj. There the said case was registered as Sessions Case No. 44/84.

6. On receiving the said case, learned Additional Sessions Judge supplied copies of police investigation papers to the respondents. Charge at Exh.1 was framed. It was read over and explained to the respondents. The respondents pleaded not guilty to the said charge and, therefore, the learned Additional Sessions Judge proceeded to record the evidence produced before him by the prosecution.

7. In order to bring home charge to the respondents, the prosecution has examined following witnesses:-

(1) P.W.1-Rajnikant Laxmishanker Raval at Exh.13
(2) P.W.2-informant Bhura Rata atExh.15
(3) P.W.3-Teja Jiva at Exh.16
(4) P.W.4-Lakhman Radha at Exh.17
(5) P.W.5-Jiva Bachu at Exh.18
(6) P.W.6-Juma Vala at Exh.19
(7) P.W.7-Ghanshyamsinh Danubha at Exh.21
(8) P.W.8-Uga Bhura at Exh.23
(9) P.W.9-Dr. Somchand Kanji Momaya at Exh.25
(10) P.W.10-Ramsing Uttesinh Chaudhary at Exh.27
(11) P.W.11-P.S.I. Natvarsinh Bhagvatsinh Rathod at Exh.31.
(12) P.W.12- P.S.I. Navalsinh Jesangji Chauhan at Exh.37.

The prosecution has also produced on record postmortem notes, discovery panchnama, other panchnamas, F.I.R. etc. in support of its case before the Sessions Court.

8. On conclusion of the evidence, the learned Additional Sessions Judge recorded further statements of the respondents under section 313 of the Code. There the respondents again pleaded not guilty to the charge and stated that a false case was made out against them.

9. After recording further statements of the respondents, the learned Additional Sessions Judge heard the arguments advanced by the learned Additional Public Prosecutor as well as the learned advocates for the defence. It appears that the learned Additional Public Prosecutor had also submitted written arguments before the Trial Court, which had also been taken on record.

10. On appreciation of evidence on record as well as the arguments advanced before him, the learned Additional Sessions Judge found that the prosecution had not been able to prove the case beyond any reasonable doubt. The Trial Court also found that the oral evidence of the eye witnesses was contradicted by the medical evidence. The Trial Court also found that the conduct of the witnesses was not natural and, therefore, the Trial Court held that the prosecution had failed to prove the case against the respondents beyond reasonable doubt. Accordingly, the Trial Court passed an order acquitting the respondents of the charges referred to hereinabove.

11. Feeling aggrieved by the said judgment and acquittal order of the learned Additional Sessions Judge, the State of Gujarat has preferred this appeal before this Court under section 378 of the Code. It has been

mainly contended here that the learned Additional Sessions Judge has committed an error in not properly appreciating the evidence produced before him by the prosecution. That the learned Additional Sessions Judge ought to have held that the case against the respondents had been duly proved by the prosecution. That the learned Additional Sessions Judge ought not to have given undue weight to the formal contradictions which were not material for the purpose of deciding the case. It is also contended that the learned Additional Sessions Judge has not given due and proper weight to the eye witnesses examined by the prosecution. It is further contended that the eye witnesses had no motive to falsely involve the respondents in a serious charge of murder and, therefore, that aspect should have been properly considered by the Trial Court. That the discovery panchnama has been proved and that fact should have been properly considered by the Trial Court. That on the whole, the judgment and acquittal order of the Trial Court are erroneous and illegal and deserve to be set aside.

12. It is, therefore, prayed that the present appeal be allowed, the judgment and acquittal order of the trial Court be set aside and the respondents abovenamed be convicted for the offences for which they had been charged before the trial Court and be appropriately sentenced.

13. On receiving the appeal, the same was admitted and bailable warrants were issued against the respondents. In response to service of notice, Mr. J.G.Shah, learned advocate appeared on behalf of the defence. We have heard the arguments advanced by Mr. B.D.Desai, learned A.P.P. on behalf of the State and Mr. J.G.Shah, learned advocate appearing for the respondents. Incidentally it may be noted that the original informant has been represented by learned counsel Mr. C.H.Vora and at his request he was also heard by us. All the three learned advocates have extensively argued before us. They have taken us through the oral as well as documentary evidence on record. They have also taken us through the judgment recorded by the trial Court.

14. It would, therefore, be necessary for us to consider as to whether there is any error committed by the trial Court while acquitting the respondents abovenamed.

15 It would, therefore, be necessary to consider the medical evidence produced before the Trial Court through

Dr. Somchand Momaya at Ex.25.

16. It would be interesting to note that as per the prosecution case, the incident took place on 30th January, 1984 at about 5.45 P.M. The prosecution witness Dr. Momaya at Exh.25 has deposed before the Court below that he was working as a Medical Officer in General Hospital at Bhuj. That on 31st January, 1984, he received dead body of deceased Radha Vala at 10.30 A.M. for performing postmortem. He has also stated that he commenced postmortem at 11.30 A.M.and concluded the same at 1.30 P.M. He has described the injuries noticed by him on the dead body of the deceased in his postmortem note.

17. He has also stated that the aforesaid injuries were antemortem. He has further stated in Para-5 of his deposition that Radha Vala must have died before about 24 hours before he commenced postmortem on the dead body of the deceased. Now, as the postmortem was commenced at 11.30 A.M. on 31st January, 1984, the evidence coming from para-5 of his deposition that the deceased must have died before 24 hours of commencement of postmortem, would go to show that according to the opinion of the doctor, the deceased must have died around 11.30 A.M. on 30th January, 1984.

18. In order to render the above opinion, the doctor has given reasons in his evidence. There he has deposed that upper part of the body of the deceased had been relaxed from rigor mortis but the lower part of it was still under its effect. He has further stated that rigor mortis starts from upper part of the body and the relaxation also starts from the upper part of the body. On the aforesaid opinion, he has further opined that death must have taken place atleast 24 hours before the commencement of the postmortem, since the process of rigor mortis was over and relaxation of the body of the deceased was in progress.

19. This evidence has come in examination-in-chief itself. It has come on record at the instance of learned A.P.P. before the Trial Court. This would mean that according to the case of prosecution through the evidence of Dr. Momaya, the death of the deceased had taken place at about 11.30 A.M. on 30th January, 1984.

20. As against this, two prosecution witnesses who have been cited as eye witnesses by the prosecution, have given a totally different story before the Trial Court. The first is informant Bhura Rata, who has deposed at

Exh.15, that the incident took place at 5.30 P.M. on 30th January, 1984. Almost similar version has been given before the Trial Court on oath by his companion eye witness Teja Jiva at Exh.16.

21. The said version of these two eye witnesses has been supported by Lakhman Radha at Exh.17 - son of the deceased. Even Uga Bhura, who has been examined as witness and who is said to have witnessed the respondents running away from the spot after occurrence of the aforesaid offence, also supports the case of the aforesaid two eye witnesses. Therefore, it was the consistent case of the prosecution before the Trial Court that the incident took place at about 5.30 P.M. on 30th January, 1984.

22. So, on one hand the prosecution has set out a case that the incident took place at 5.30 P.M. on 30th January, 1984 through oral evidence of eye witnesses and other such witnesses. Same way the prosecution has also set out a case before the trial Court through the evidence of Dr. Momaya that the incident had taken place at about 11.30 A.M. on 30th January, 1984.

23. This is not a marginal difference which would ordinarily be there between the oral evidence and the evidence rendered on opinion of medical expert. 11.30 A.M. and 5.30 P.M. are two different timings given by two different sets of witnesses and the margin between the two is quite noticeable.

24. This means that the prosecution itself has come out with two different cases, which are contradictory to one another. On this aspect of the case, it would be relevant to consider the decision of the Hon'ble Apex Court in the case of Harchand Singh and another v. State of Haryana, reported in AIR 1974 S.C. 344. The Hon'ble Apex Court has observed in this decision that in a case where the prosecution leads two sets of evidence, each one of which contradicts the other,it is difficult to found the conviction of the accused. The Hon'ble Apex Court has also observed that it was a case wherein one set of evidence condemned the other set leaving the Court with no reliable and trustworthy evidence upon which the conviction of the accused might be based.

25. On the aforesaid observations, the Hon'ble Apex Court allowed the appeal and reversed the conviction recorded by the High Court of Punjab and Haryana and acquitted the appellants-accused persons.

26. Applying the principle enunciated in the aforesaid decision to the facts of the case before us, it is apparently clear that in the case before us also the prosecution has come out with two contradictory cases; the first being a case of incident being taken place at 5.30 P.M. on 30th January, 1984. This version has come through two eye witnesses and other witnesses supporting the eye witnesses. The other version has come from the evidence of Dr. Momaya, who has positively opined that the incident must have taken place around 11.30 A.M. on 30th January, 1984. Therefore, the prosecution has set out two contradictory cases and both have come through prosecution during the course of examination-in-chief taken by the learned A.P.P. before the trial Court.

27. Apart from the medical opinion based on the fact of rigor mortis and relaxation of the body of the deceased from the effect of rigor mortis, there is one additional circumstance leading us to infer that the death of the deceased must have taken place in the morning hours around 12.00 noon. The Doctor witness and the postmortem note prepared by him and placed at Exh. 26 clearly shows that the body of the deceased did possess semi-digested food. The prosecution case, through the evidence of Laxman i.e. son of the deceased, at Exh.17,is that the deceased used to have his tea and breakfast in the morning and thereafter he used to leave around 9.00 A.M. or 10.00 A.M. for taking round of his fields and used to return around 5.00 P.M. in the evening. He does not say that the deceased used to have his lunch in the afternoon or that someone used to carry his lunch in the afternoon. When semi-digested food particles were noticed by the medical expert while carrying out postmortem of the dead body of the deceased, it would clearly mean that the deceased must have died within 2 to 3 hours of taking his breakfast. If we take it that the deceased had taken his breakfast on the date of his death at about 9.00 A.M. then his death must have taken place around 12.00 noon and not thereafter. Therefore, this evidence further supports the opinion of the doctor witness that the deceased died in the morning or in the afternoon and not in the evening around 5.00 P.M., since the food taken by the deceased at about 9.00 A.M. would be completely digested by that time and no semi-digested food would remain till 5.00 P.M., since it is well known that the process of digestion of food would stop as soon as a person dies. This evidence would further destroy the theory of prosecution that the deceased died at 5.30 P.M. On the other hand, this evidence raises a probability that the deceased must have died at about 12.00 noon or around that time.

This aspect of the evidence of Dr. Momaya and of postmortem note supports his opinion that the death must have taken place around 11.30 A.M. on 30.1.1984. The oral evidence of Dr. Momaya, the postmortem note prepared by him, his opinion based on the condition of the dead body of the deceased and the presence of semi-digested food in the dead body of the deceased are very consistent factors. In that event, neither the informant-Bhura Rata nor his companion eye witness could be present there to witness the entire episode. This could be an additional ground for not accepting their evidence and once they are not accepted as eye witnesses, then there is no witness to show that the injuries sustained by the deceased were caused by inflicting blows by the present respondents and none-else. This would seriously create a doubt in the entire case of the prosecution that the respondents had caused the said injuries and as a result thereof, the deceased died.

28. It is to be seen here that despite the fact that Dr. Momaya had tendered above evidence before the trial Court, the learned A.P.P. had not made any effort to clarify the position. Even the second opinion was also not sought to be produced to explain the contradictory versions on record. The prosecution had all opportunity to explain the position on record. Despite the said position, the prosecution has not availed of the said opportunity to explain the position on record. Therefore, the fact remains that two contradictory stands taken by the prosecution before the trial Court have remained on record and they have remained on record without any further explanation about such contradictions on record.

29. We are required to appreciate the evidence on record in the light of the background of the aforesaid contradictory versions set out by the prosecution before the trial Court.

30. Then, we find that the prosecution has examined the aforesaid two eye witnesses. The first is Bhura Rata at Exh.15, who is said to be an eye witness and who had lodged the F.I.R. before Bhuj Taluka Police Station. It would be important to note that according to this witness, he was grazing his cattle in the sim of village Mokhana. He has also deposed that his companion eye witness Teja Jiva was also grazing his cattle nearby. Therefore, according to these two witnesses, they were eye witnesses who were in a position to see the deceased also moving around in the vicinity.

31. This witness Bhura Rata at Exh.15 has clearly deposed that when the deceased Radha Vala was returning towards village Mokhana after having a round of his fields, six respondents came there from the opposite direction and that all of them were armed with weapons. That respondent no.4 Radha Sava was armed with an axe, respondent no.1 was armed with a spear and the remaining respondents were armed with sticks with iron rings. He has also deposed that the deceased was surrounded by the respondents and they all started beating the deceased with the weapons handled by them. The witness has also deposed that the respondent no.4 Radha Sava had dealt an axe blow on the face of deceased Radha Vala. That, therefore, deceased Radha Vala had fallen down on the ground. That respondent no.1 then dealt a blow with spear on the deceased and the remaining 4 respondents were shouting, 'kill him, kill completely'. That they were also beating the deceased by means of sticks. That by the time he could reach the spot, the respondents ran away towards village Mokhana.

32. On this aspect of the case, it would be relevant to consider the evidence of F.I.R. lodged by this witness. If we consider the F.I.R. lodged by this witness, then it becomes clear that the witness has not stated to the police station officer that he had seen respondent no.4 dealing an axe blow on the face of the deceased. He has also not stated in the F.I.R. that respondent no.1 had dealt a spear blow after the deceased had fallen down. He has also not stated in the F.I.R. that the remaining four respondents were shouting 'kill him, kill completely'. So, it is very clear that the witness has made material improvements on the question of fact with respect to the material aspects of the case during the course of his evidence.

33. For this purpose, attention of the witness was drawn by the defence Lawyer to the said contradiction during the course of cross-examination. There he has stated that it is not true that he has not stated in the F.I.R. that respondent no.4 had dealt an axe blow on the face of the deceased. Similarly, in respect of other contradictions, he has stated that it is not true that he has not stated so in the F.I.R.

34. However, the F.I.R. has been produced on record. On perusal of the said F.I.R., it becomes clear that the aforesaid facts had not been conveyed in the F.I.R. by the witness at the relevant point of time. There is material improvement with respect to the role played by

the respondents at the time of incident in question. When the witness makes material improvement during the course of evidence for the first time, then in that event, in certain circumstances, his evidence becomes doubtful, unless the same has been properly explained either through the evidence of other witness or through other circumstances.

35. His companion Teja Jiva at Exh.16 also sailed in the same boat. According to his deposition at Exh.16, his attention was drawn by previous witness Bhura Rata and on hearing shouts, he also went to the spot where the deceased was being allegedly beaten by the respondents. This witness has also stated that by the time they could reach near the spot in question, he saw respondent no.4 dealing an axe blow on the face of the deceased and that the deceased had fallen down on receiving the said injury. That thereafter respondent no.1 dealt a spear blow on the face of the deceased. That the remaining respondents had been beating the deceased and by the time they could reach the spot, the respondents had run away along with their weapons.

36. Now, here also the witness was cross-examined at length and same way he was also confronted with his previous statement recorded by police under section 161 of the Code. He has denied that he has not stated the aforesaid fact before the police, but the investigating officer who had recorded his statement was required to prove contradictions and there is no dispute that the contradictions have been duly proved through the evidence of P.S.I. who has recorded the statement of this witness.

37. This means that these two witnesses are eye witnesses and they both have shown material improvements during the course of their evidence for the first time. The improvement is also found to be consistent.

38. In other words, the two witnesses had not stated in the F.I.R. as well as in their statement before the police as to details of the incident. However, during the course of their oral testimony, they have changed their version and they have given description as to the role played by each respondent . This shows that there is material improvement shown by the witnesses. The witnesses are also consistent in showing the improvements from their earlier version.

39. In the above view of the matter, it would be relevant to consider their evidence with the evidence of

Doctor's opinion. It would be clear that if the witnesses had seen the event, there would be no question of improving version. On the other hand, if the incident had taken place at 10.30 A.M. or 11.30 A.M. on 30th January, 1984, then naturally the witnesses who have posed themselves as eye witnesses, would not have been present at the time of occurrence of the incident in question and consequently the aforesaid contradictions have occurred because of the fact that they might not have seen the incident and yet they have been required to give description about the said incident. Once it is found that the incident had taken place at about 11.30 A.M. on 30th January, 1984 in absence of these two witnesses, then naturally there would be lot of contradictions in the version given by these two witnesses more particularly when they were required to state something which might not have been seen by them.

40. Lakhman Radha at Exh.17 has been examined by the prosecution, who had gone to the spot after being informed by informant Bhura Rata. He is the son of the deceased. The witness says that Bhura Rata had come to him and had given detailed version as to how the incident had taken place. If informant Bhura Rata had actually gone to this witness Lakhman Radha, then in normal course informant Bhura Rata would give resume of event in a shortest possible manner. Instead, according to the case of Lakhman Radha at Exh.17, detailed version of the incident in question was conveyed to him by informant Bhura Rata. Informant Bhura Rata, according to the evidence of this witness, started narrating the incident by saying as to where they were standing; where the deceased was there at the time of the event, how the event took place, the direction from which the respondents reached there, how they surrounded the deceased, how the deceased started shouting, how two witnesses reached the spot, how the respondents dealt blows with axe, spear and sticks and so on. It would be very difficult to swallow this aspect of evidence of this witness.

41. At one hand, the deceased had died, his dead body was lying on the spot, the witness was the son of the deceased, he was required to rush back to the spot to see the face of his deceased father. Therefore, everybody would be in a hurry and in ordinary course of nature, informant Bhura Rata would not give detailed resume of the incident in question, which would be almost copy of what he had deposed before the Trial Court as to how the incident had taken place. Therefore, this conduct on the part of Bhura Rata as well as on the part of this witness

does not appear to be natural.

42. Again, this witness has also been confronted with by his previous statement recorded by the police under section 161 of the Code.

43. The prosecution has come out with a case that in the past there was a murder of Sava Bhachu and Bhikha Rata. That in the said case, deceased Radha Vala, informant Bhura Rata and others were arrested, but they were acquitted by the Court concerned. That because of the said enmity, the respondents had assaulted the deceased. This version is given by informant Bhura Rata right from the beginning.

44. Now, it is a fact that the said incident had taken place long back. Lakhman Radha had also stated that the deceased and the respondents had good relations. That there were some chapter cases between them in 1982, but that matter was settled and, therefore, none of the parties was required to be bonded by the Executive Magistrate.

45. So, on one hand the prosecution has come out with a case of enmity and on the other hand, this witness ruled out the theory of enmity by saying that the relations were not so bad, even if they were not very cordial.

46. The prosecution has also examined Uga Bhura at Exh.23. The prosecution has come out with a case that this Uga Bhura was going to Bus Stand in the evening of the date of incident and he had seen the aforesaid respondents returning to village. The prosecution case is that the respondents had been on the way back to village after commission of the offence and at that time, Uga Bhura had seen them going collectively with weapons in their hands. This witness at Exh.23 has also deposed that he was going to Bus Stand and at that time, he had seen these respondents returning towards the village. He has also deposed that respondent no.1 was armed with a spear, respondent no.4 was armed with an axe and the remaining respondents were armed with sticks. Now, it is to be seen that the case of the prosecution is that the respondents were armed with aforesaid weapons and according to the case of prosecution, spear as well as axe both were stained with blood. The witness does not say that he had seen the respondents carrying spear and axe stained wit blood.

47. The prosecution has also come out with a case

that clothes of the respondents were stained with blood. The prosecution has produced material to show that the aforesaid two weapons and clothes of the respondents were stained with blood, yet the witness does not say that he had seen the clothes of the respondents stained with blood.

48. If the witness had actually seen the respondents running away with weapons as stated by him, then in normal course, the witness would have noticed presence of blood on the axe, spear and on the clothes of the respondents. The witness does not say anything about the same. An attempt has been made on behalf of the State by the learned A.P.P. to state that there was no sun light, as it was winter season and, therefore, the respondents may not have noticed presence of blood on the weapons as well as on the clothes of the respondents. Now, at the same time, it is a fact that the eye witnesses had seen the respondents committing the offence from a distance. Same way, this witness had also seen the respondents going at some distance. If the light was not sufficient, then probably they could not have seen and identified the respondents at the relevant point of time. So, if the light was not sufficient or there was darkness at the relevant point of time and because of that, if the witnesses could not have noticed blood on the weapons as well as on the clothes, then this fact would go against the prosecution as aforesaid. In that view of the matter, it is probable that the witnesses could not have identified the respondents because of insufficiency of light.

49. It is well settled that if there are two possible views, then the view favourable to the defence has to be accepted. Therefore, even if we take it that it was probable for the witnesses to identify the respondents, there is every probability that as there was insufficient light, they could not do so. Therefore, that probability will have to be accepted and it has to be found that the eye witnesses as well as Uga Bhura might not have been able to identify the respondents as accused persons carrying weapons at the relevant point of time.

50. Once the evidence of aforesaid witnesses is not found to be reliable, then in that event the other witnesses are of formal nature. It would be seen that apart from the aforesaid contradictions between the eye witnesses and the medical evidence, there are other contradictions also. The witnesses have consistently told before the Court below that respondents no.2,3, 5 & 6 had dealt stick blows and they were holding sticks with

iron rings. However, the medical evidence does not support the said evidence and we do not find any evidence showing that there were injuries on the person of the deceased, which could be caused by sticks with iron rings

51. Moreover, when four persons had been beating the deceased, the deceased would have sustained so many injuries by means of the said sticks. Such injuries have not been noticed by Medical Officer Dr. Momaya and even the postmortem note produced by him does not indicate that such injuries were there on the person of the deceased. Therefore, the aforesaid evidence of these two witnesses, who have posed themselves as eye witnesses that four respondents had dealt stick blows on the deceased, also stands falsified or atleast, the said evidence stands contradicted and is not supported by medical evidence.

52. Out of these two witnesses, Bhura Rata had conveyed it to the son of the deceased and, therefore, the son Laxman had also deposed the said fact before the trial Court. Therefore, even that evidence given by the son of the deceased also stands falsified.

53. Teja Jiva at Exh.16 has first deposed that the deceased was hit by sticks by aforesaid four respondents being respondents no.2,3,5 & 6. In para-11 of his cross-examination, he has deposed that he had not seen stick injuries on the person of the deceased.

54. The two witnesses have also deposed that when the deceased was being beaten by the respondents, the deceased had raised his hands in order to defend himself. If that is so, then naturally there would be some injuries on the hands of the deceased. Surprisingly enough, the medical evidence does not show any injury on the hands of the deceased. This also shows that the version given by these two witnesses does not appear to be true.

55. Teja Jiva at Exh.16 has also stated in para-11 of his cross-examination that after the respondents arrived at the spot, there was some quarrel between the deceased and the respondents. However, informant Bhura Rata does not say anything about the same. Therefore, there is apparent contradiction between the version of these two eye witnesses.

56. This witness has also stated in para-10 of his evidence that informant Bhura Rata had caught hold of hands of the deceased and found that the deceased had

passed away. On the other hand, informant Bhura Rata had gone on the other way to say that he had not touched the deceased at all. So, there is a minor contradiction between the versions of the two eye witnesses.

57. The two eye witnesses have also come out with a case to the effect that an inquiry was made from the deceased as to why he was beaten, at which the deceased could utter only a word 'Bhachu' (referring to respondent no.1).

58. It is very clear that the two witnesses knew about the previous history of enmity. Both of them knew the previous sessions case as well as chapter cases. In that view of the matter, there was absolutely no necessity for informant Bhura Rata to inquire from the deceased as to why he was beaten by the respondents. Therefore, even this query put by him also shows that his conduct was also not natural.

59. It appears that this question/query and reply had been put by the witness and informant Bhura Rata in the F.I.R. itself with a view to bring the name of respondent no.1 on record through the mouth of the deceased, who was on his death bed. Indirectly, there is an attempt to bring a dying declaration of the deceased through the evidence of this witness. As stated above, this conduct is not natural and, therefore, it would not be possible for this Court to treat the same as a dying declaration of the deceased before informant Bhura Rata.

60. It would also be relevant to consider that informant Bhura Rata was also an accused person in the previous sessions case. Therefore, if there was any enmity against the deceased, then the respondents had equally the same sort of enmity with this witness also. So, on one hand, if they wanted to kill the deceased on account of previous enmity, they would also like either to kill or to cause hurts to the witness informant Bhura Rata. The respondents presumably were aware of the fact that informant Bhura Rata had become an eye witness and therefore, if he was saved and was not killed, then certainly he would go to the Police Station and inform there about the event in question. In that view of the matter, the respondents would not leave informant Bhura Rata without any injury. They would not allow the eye witnesses to run away. Same way, no injury was caused to his companion eye witness, which would also show that the theory advanced by these two witnesses that the respondents ran away leaving them unhurt, is not natural and probable. It is important to note that the

respondents were six in number and all were armed with weapons and on the other hand informant Bhura Rata and Teja Jiva were also there only two in number. It is not their case that they were armed with weapons. Therefore, it is not probable that the respondents would run away on seeing empty handed informant Bhura Rata and Teja Jiva coming to the spot. Therefore, this version of this witness also does not appear to be probable.

61. The doctor has also given evidence with respect to the nature of injuries sustained by the deceased. Dr. Momaya at Exh.25 has clearly deposed that external injuries no.1 to 4 were grave in nature, but according to the opinion of Dr. Momaya, they were not sufficient in the ordinary course of nature to cause the death of the deceased. It is further noticed and deposed by the doctor that they were all external injuries and they were not on vital part of the body of the deceased. He has further deposed that death of the injured would take place if treatment is not given to him for about 3 to 4 hours. This would mean that the deceased could remain alive for about 3 to 4 hours after receiving injuries in question.

62. On the other hand, the evidence of the two eye witnesses goes to show that the deceased died soon after receiving injuries at the hands of the respondents and was unable to utter even more than one word 'Bacho'. So, again there is contradictory versions between the evidence of eye witnesses and the medical expert's opinion. This would also raise a probability that the respondents may not have witnessed the incident. It also raises a probability that the deceased may have died at 10.00 or 11.00 A.M. after receiving some injuries at the hands of somebody. Since he did not receive any medical treatment after receiving injuries for 3 to 4 hours. It may be that the informant and his companion eye witness may have gone to graze their cattle in the evening at the place where the dead body of the deceased was lying. They may have noticed that the dead body of the deceased was lying at the spot in question and, therefore, they may have filed the F.I.R. with a view to implicate the present respondents on account of previous enmity. This probability cannot be ruled out. As stated above, when two probabilities are possible, then the probability in favour of defence is required to be accepted.

63. The trial Court has given detailed and cogent reasons for not accepting the testimonies of the aforesaid witness. In our opinion, the view adopted by the Trial Court does not appear to be altogether illegal

or perverse. It cannot be said that the said view is against the weight of the evidence on record. The trial Court had an opportunity to see the witnesses while giving evidence from the witness box. Therefore, after appreciation of evidence of such witnesses, the trial Court has arrived at a finding that the witnesses referred to hereinabove, are not reliable.

64. Even if two views are possible, it cannot be said that the view adopted by the trial Court is illegal and, therefore, this Court should substitute its own view in place of the view recorded by the trial Court.

65. Even otherwise, when this Court sitting as a Court of appeal confirms the finding of facts of the trial Court, then it is not very much necessary to record detailed reasons for confirming the finding of facts recorded by the trial Court. It is not necessary to reiterate the same. However, when the matter has been argued at length by the learned A.P.P. , by Mr. Vora, learned advocate for the original informant and by Mr. J.G.Shah, learned counsel for the defence, we found it proper to discuss the same at length.

66. In view of the above, we are of the opinion that the learned Trial Judge has not committed any error in recording the aforesaid findings of fact and in not relying upon the evidence of the so-called eye witnesses. We do not find any reason to differ from the view adopted by the trial Court and therefore, there is no merit in the present appeal. Consequently, the appeal deserves to be dismissed.

For the reasons recorded hereinabove, this appeal is ordered to be dismissed and the judgment and acquittal order of the Trial court are hereby confirmed. The muddamal articles shall be disposed of in accordance with the order passed by the Trial Court.

(J.M.Panchal,J.)

(D.P.Buch, J.)

(patel)